86-928

No.

IN THE

Supreme Court Of The United States

October Term, 1986

EDDIE BARNARD NEAL,

Petitioner,

vs.

J. D. WHITE, WARDEN, AND
CHARLES GRADDICK, ATTORNEY GENERAL
OF THE STATE OF ALABAMA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Attorney for Petitioner Neal

November, 1986

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QUESTIONS PRESENTED

1. WHETHER THE HONORABLE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT MISAPPLIED THE REQUIREMENT THAT A DEFENDANT BE ENTITLED TO CONFRONT WITNESSES AGAINST HIM AS REQUIRED BY THE SIXTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

2. WHETHER THE REQUIREMENTS OF THE SIXTH AMENDMENT OF THE UNITED STATES ARE MET IF A PROSECUTION WITNESS TESTIFIED AT AN EARLIER HEARING AND HIS TESTIMONY WAS READ IN THE CASE AT BAR IF IT WAS NOT CONCLUSIVELY SHOWN THAT THE WITNESS WOULD NOT BE AVAILABLE IN THE FUTURE.

CERTIFICATE OF INTERESTED PERSONS

I hereby certify that the following are the only persons known to Petitioner Eddie Bernard Neal and undersigned counsel who are parties to or otherwise interested in these proceedings:

Eddie Bernard Neal

J. D. White, Warden

Honorable Charles Graddick, Attorney General of the State of Alabama

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TABLE OF AUTHORITIES

No.

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October Term, 1986

EDDIE BARNARD NEAL,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is an unpublished opinion; however, same is set forth in the Appendix *infra* pages A-1 to A-3.

JURISDICTION

The Petition invokes this Court's jurisdiction pursuant to Title 28, United States Code, Section 1254, in that a claim of the Petitioner's rights is presented under due process of law provisions of the Fifth Amendment, the Fourteenth Amendment, and the Sixth Amendment to the Constitution of the

United States of America. The United States Court of Appeals for the Eleventh Circuit affirmed in part and reversed in part Petitioner's Appeal from a denial of Petitioner's Petition For Writ of Habeas Corpus filed in the United States District Court for the Northern District of Alabama. The Petitioner did not seek a rehearing either by a three judge panel or *en banc* in the appellate court below.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States in pertinent part states as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty or property without due process of law . . ."

The Fourteenth Amendment to the Constitution of the United States in pertinent part states as follows:

> ". . . nor shall any state deprive any person of life, liberty or property, without due process of law . . ."

The Sixth Amendment to the Constitution of the United States in pertinent part states as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . to be confronted with the witnesses against him; . . ."

STATEMENT OF THE CASE

Eddie Bernard Neal was indicted for capital murder in March of 1977 for the death of Quenette Shehane who was killed on December 20, 1976. Petitioner was convicted of this crime in August of 1978 and sentenced to death by a jury in the Tenth Judicial Circuit of Alabama (Jefferson County, Alabama). This verdict was commuted to life imprisonment, without parole, by the trial judge, Charles Nice.

The conviction was later reversed and remanded for a new trial in accordance with the United States Supreme Court decision of *Beck vs. Alabama*. The Petitioner was again convicted of robbery-murder on August 13, 1982, and sentenced to life without parole. This conviction was affirmed by the Alabama Court of Criminal Appeals on June 12, 1984. Rehearing was denied on July 17, 1984, and the Alabama Supreme Court denied certiorari on November 30, 1984. Petitioner filed a pro se petition for a Writ Of Error Corum Nobis to the Tenth Judicial Circuit of Alabama for Jefferson County on March 5, 1985, and said Petition was denied without opinion on March 5, 1985. Petitioner appealed this decision to the Alabama Court of Criminal Appeals and same was affirmed without opinion on June 11, 1985. Application For Rehearing was denied on July 23, 1985.

Petitioner then filed a Petition For Writ Of Habeas Corpus, pro se, on August 9, 1985. On September 30, 1985, Petitioner's Petition For Writ Of Habeas Corpus was denied by the United States District Court For The Northern District of Alabama without an evidentiary hearing, and Petitioner, pro se, filed timely notice of Appeal and certification of probable cause to the United States Court of Appeals for the Eleventh Circuit. The United States Court of Appeals for the Eleventh Circuit affirmed in part and vacated in part and remanded part of the Petition to the United States District Court For The Northern District of Alabama for further proceedings. This Appeal is taken from that portion of the decision and judgment of the United States Court of Appeals for the Eleventh Circuit which was affirmed.

STATEMENT OF THE FACTS

Facts Relating To The Admission Of The Testimony of Leonard Mitchell Robbins (L. M. Robbins) From a Previous Trial of Petitioner's Case

During the trial upon which Petitioner's conviction was obtained and from which appeals were taken through the Appel-

late Courts of Alabama and then to the United States District Court For The Northern District Of Alabama and ultimately to this Court, the testimony of L. M. Robbins was read to the jury from the transcript of a previous trial held during the week of July 31, 1978, which conviction was reversed by the Appellate Courts of Alabama (R - 306 - 319). The proffer and introduction of the reading of the former transcript of L. M. Robbins' testimony was predicated upon a medical condition from which the witness suffered, which was described as an evaluation for coronary artery bypass surgery (R - 282). He was being admitted to the hospital for "evaluation of a heart disease." (R - 282). A description of the witness's condition was based upon a doctor's letter, a motion, and the testimony of one David L. Higgins (R - 284 - 287). The transcript was supported by the testimony of the Court Reporter who took it down in the previous Hearing, Walter Enoch (R - 292 - 297). Timely objections were made to the introduction of all aspects of the reading of the transcript (R - 285, 286, 287, 292, 297, and 299). The Court overruled all objections and Motions For Mistrial (R - 289, 292, and 298).

ARGUMENT

The Eleventh Circuit Court of Appeals, in its unpublished opinion, stated as follows with regard to Petitioner's assertion that his Sixth Amendment rights were violated:

> "Petitioner's fourth claim arises out of the trial court's ruling that the prosecution could introduce into evidence the testimony a police officer gave at petitioner's previous trial on the charge in this case. This testimony was admitted because the officer was unavailable. We find no error, much less constitutional error, in its admission. Petitioner's trial lawyer was present when the officer testified on the earlier occasion and had ample oppostunity to examine him. Moreover, the testimony bore sufficient indicia of reliability to render it probative."

The Eleventh Circuit Court of Appeals failed to follow the dictates set down by this Honorable Court in *Pointer vs. Texas*

(1965), 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 which states that the major underlying concept of the constitutional confrontation rule is to give a Defendant charged with crime an opportunity to cross-examine the witness against him. *Pointer vs. Texas* and other cases cited herein further hold that the Sixth Amendment's right of accused to confront witnesses against him is a fundamental right essential to a fair trial and is made obligatory on the various states by the due process clause of the Fourteenth Amendment. Therefore, the confrontation clause of the Sixth Amendment is enforceable against the states under the Fourteenth Amendment according to the same standards which protect the right to confrontation against federal encroachment. See also, *Burgett vs. Texas* (1967), 389 U.S. 109, 19 L.Ed.2d 319, 88 S.Ct. 258, conformed to (*Texas Criminal*, 422 S.W.2d 728; *Harrington vs. California* (1969), 395 U.S. 250, 23 L.Ed.2d 284, 89 S.Ct. 1726; *Illinois vs. Allen* (1970), 397 U.S. 337, 25 L.Ed.2d 353, 90 S.Ct. 1057, 51 Ohio Opus 2d 163, rehearing denied, 398 U.S. 915, 26 L.Ed. 2d 80, 90 S.Ct. 1684; *Dutton vs. Evans* (1970) 400 U.S. 74, 27 L.Ed.2d 213, 91 S.Ct. 210, on remand (CA 5 Georgia) 441 F.2d 657; *Davis vs. Alaska* (1974) 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105; *Dowdell vs. United States*, 221 U.S. 325, 55 L.Ed. 753, 31 S.Ct. 590; *Motes vs. United States*, 178 U.S. 458, 44 L.Ed. 1150, 20 S.Ct. 993; *Kirby vs. United States*, 174 U.S. 47, 43 L.Ed. 890, 19 S.Ct. 574.

These cases also hold, in part, that the primary purpose of the confrontation clause afforded by the Sixth Amendment to the United States Constitution is not only to secure the right of cross-examination but to additionally give the jury an opportunity to observe a witness. In *Rado vs. Connecticut* (1979), (CA 2 Conn.) 607 F.2d 572, cert. denied, 447 U.S. 920, 65 L.Ed.2d 1112, 100 S.Ct. 3009, this Court stated that the mission of the confrontation clause of the Sixth Amendment is to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that the trier of fact has a satisfactory basis for evaluating the truth of prior statements.

In *Curtis vs. Reeves* (1941), 75 App.D.C. 66, 123 F.2d 936, the Court stated that the guarantee of the Sixth Amendment is to secure to the accused in the right to be tried so far as facts proveable by witnesses are concerned by only presenting such witnesses as meet him face-to-face at trial, and who give their testimony in his presence, and give to the accused the opportunity of cross-examination.

The denial of the right of cross-examination was set out in *United States vs. Stone* (1979), (CA 5 FL.) 604 F.2d 922, 4 Federal Rules Evid. Serv. 1495, which stated that the Sixth Amendment right to confront witnesses was to prevent *ex parte* affidavits. What is the difference basically so far as due process is concerned between an *ex parte* affidavit and a deposition or transcript wherein the right to cross-examine has been denied?

Also in this regard see *Hopkinson vs. State* (1981 Wy.), 632 P.2d 79, cert. denied, 455 U.S. 922, 71 L.Ed.2d 463, 102 S.Ct. 1280, and later App. (Wy.) 664 P.2d 43, cert. denied (U.S.) 78 L.Ed.2d 246, 104 S.Ct. 262 which states that the chief purpose of the confrontation clause is to bar the particular guise of trying Defendants on "evidence" which consists solely of *ex parte* affidavits and depositions secured by examining magistrates. The aim of the clause is to compel any witness against the accused to stand face-to-face with the jury in order that they may look at him and judge by his demeanor upon the stand and manner in which he gives his testimony whether he is worthy of belief. While Petitioner is aware that the Eleventh Circuit Court of Appeals has relied upon the verbiage in *Martinez vs. State* (1980) Wy. 611, P2d 831, Petitioner asserts that the Eleventh Circuit Court of Appeals has overlooked the pronouncements of *United States vs. Edwards* (1972, CA 5 Tex.) 469 F.2d 1362 which states that the use at a criminal trial of recorded testimony of a witness denies the Defendant's right of confrontation guaranteed by the Sixth Amendment subject to the limited exception where the witness is shown to be unavailable at the present trial and was subject to adequate cross-examination at a previous trial or hearing. Petitioner asserts that the witness, who was allowed to testify at his

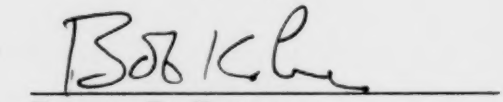
trial, was not subjected to adequate cross-examination at a previous trial or hearing.

The United States Court of Appeals for the Eleventh Circuit also has overlooked the case of *State vs. Herrera* (1979) 286 Ore. 349, 594 P.2d 823 which states that a prosecutor wishing to use prior recorded testimony which will deny the Defendant his constitutional right to confront witnesses must justify the use of the evidence and show that he was in no way responsible for the necessity of its use. Further, Petitioner would assert that the dictates of *Martinez vs. State (infra)* have not been met which would require that the evidence presented at the second trial would not "not touch upon any new and significantly material line of inquiry."

CONCLUSION

Petitioner asserts that his basic fundamental guarantees of life and liberty afforded by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution have been violated, and he has been denied life and liberty without due process of law. For these reasons, a Writ Of Certiorari should issue to review the Judgment and Opinion of the Eleventh Circuit Court of Appeals.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7645
Non-Argument Calendar

EDDIE BARNARD NEAL,

Petitioner-Appellant,

versus

J. D. WHITE, Warden, and
THE ATTORNEY GENERAL OF
THE STATE OF ALABAMA,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(September 17, 1986)

Before TJOFLAT, HATCHETT and CLARK, Circuit Judges.

PER CURIAM:

The petitioner is an Alabama prison inmate serving a life sentence for committing the capital offense of robbery during which an intentional murder occurred. He seeks habeas corpus relief overturning his conviction on five grounds: (1) the prosecutor used his peremptory challenges to prevent blacks from serving on petitioner's jury; (2) petitioner was convicted under a state law not in effect when the crime was committed; (3) his counsel was ineffective because he (a) failed to raise grounds (1) and (2) above at trial and (b) he advised petitioner not to seek a change of venue; (4) petitioner was denied the right to confront a witness; and (5) the evidence was in-

sufficient to convict petitioner of the charged offense. The district court denied relief, and we granted petitioner a certificate of probable cause to appeal. We affirm the district court as to the first four claims and vacate and remand as to the fifth claim.

Petitioner committed a procedural default as to the first two claims by failing to raise them on direct appeal. He subsequently included these two claims in a *coram nobis* petition collaterally attacking his conviction, but, as the district court properly concluded, they were not cognizable on *coram nobis* and the Alabama courts rejected them for that reason.

These defaulted claims were subject to habeas consideration, however, in the context of petitioner's third claim – ineffective assistance of counsel. The first, concerning the prosecutor's use of the State's peremptory challenges, was patently insufficient under the prevailing legal standard, established by *Swain v. Alabama,* 380 U.S. 202, 85 S.Ct. 824 (1965); thus, counsel could not have been ineffective for failing to pursue the point on appeal. (This peremptory challenge claim may have met the standards enunciated by *Batson v. Kentucky,* ____ U.S. ____, 106 S.Ct. 1712 (1986), but *Batson* is not retroactive. *See Allen v. Hardy,* ____ U.S. ____, 106 S.Ct. 2878 (1986) (per curiam)). The second, raising the *ex post facto* issue, also lacked merit. The district court therefore correctly recognized the legal insufficiency of these two defaulted claims in rejecting petitioner's ineffective assistance claim. Petitioner's third basis for contending that his lawyer was ineffective was counsel's failure to seek a change of venue. Like the district court, we find no merit in this ground. In sum, petitioner's ineffective assistance claim must fail.

Petitioner's fourth claim arises out of the trial court's ruling that the prosecution could introduce into evidence the testimony a police officer gave at petitioner's previous trial on the charge in this case. This testimony was admitted because the officer was unavailable. We find no error, much less constitutional error, in its admission. Petitioner's trial lawyer was present when the officer testified on the earlier occasion and had

ample opportunity to examine him. Moreover, the testimony bore sufficient indicia of reliability to render it probative.

As indicated above, we vacate the district court's decision on petitioner's fifth claim. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781 (1979), requires a federal habeas court to decide whether no rational trier of fact could have found a petitioner guilty beyond a reasonable doubt on the evidence presented to the trier of fact. This quite obviously requires the federal habeas court to make an independent assessment of the evidence. Here, the district court relied instead on the Alabama Court of Criminal Appeals; the district court gave that court's finding that the evidence was sufficient a presumption of correctness under 28 U.S.C. § 2254 (d) (1982). The Alabama appellate court did not find facts; rather, its job was to determine whether the evidence was sufficient to support a conviction. This was a pure legal question whose decision was entitled to no deference in the proceedings below. We remand the case to the district court so that it can make this legal determination under *Jackson's* standard, by examining the record of petitioner's trial.

AFFIRMED in part; VACATED in part and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 85-7645
Non-Argument Calendar

D.C. Docket No. 85-2161

EDDIE BARNARD NEAL,

Petitioner-Appellant,

versus

J. D. WHITE, Warden, and
THE ATTORNEY GENERAL OF
THE STATE OF ALABAMA,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before TJOFLAT, HATCHETT and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby. AFFIRMED in part and VACATED in part; and that this cause be and the same is hereby, REMANDED to said District

Court for further proceedings in accordance with the opinion of this Court.

Entered: September 17, 1986
For the Court: Miguel J. Cortez, Clerk

By: /s/ WARREN A. GODFREY
Deputy Clerk

ISSUED AS MANDATE: Oct. 21, 1986.

[R-282] MR. BARBER: Mr. Robbins was in Carraway Methodist Medical Center • • • Dr. Kessler, states that their current plans on August 6th, their current plans or had been readmitted to the hospital at Carraway on August 9th, to be evaluated for coronary artery bypass surgery, and if he does have the surgery he will be off of work until November of '82.

• • •

[R-288] THE COURT: • • • [R-289] the fact that he is under a doctor's care for anticipated triple by-pass, open heart surgery and the fact that this witness was available for cross examination and was cross examined by the same counsel present now, I'll overrule your motion and allow this testimony to be read into the record from the transcript as previously given in prior testimony.

• • •

[R-291] MR. DINSMORE: Your Honor, I would like for the record to reflect that we are, of course, put in a position of moving for a mistrial because of the failure of the State to present a witness.

• • •

[R-292] THE COURT: All right, you motion is denied at this time.

• • •

BY MR. BARBER:

Q State your name, please.

A Walter Enoch.

Q Where are you employed, Mr. Enoch?

A I work in the Jefferson County courthouse, court reporter.

• • •

[R-293] Q And were you the court reporter in a trial that began on July 31, 1978?

• • •

Q And what case was that, please?

A It was State vs. Eddie Barnard Neal.

• • •

Q Did you transcribe the testimony of a witness, Leonard M. Robbins?

A Yes, I did.

• • •

[R-294] Q Okay, and does that transcript truly and accurately pict Officer Robbins testimony at the prior trial?

A Yes, it does.

• • •

MR. BARBER: That's all.

• • •

[R-297] MR. DINSMORE: We object to it, Your Honor. It's not shown that it's proof read.

• • •

THE COURT: • • • [R-298] All right, I am going to allow him to testify from the copy.

• • •

[R-306] • • • the Court is going to allow the reading of the transcript of the prior proceedings where this witness did testify.

• • •

(The following questions were read by Mrs. Arnold, the answers being given by Mr. Barber, as witness Robbins testimony was read into the record, as follows:)

• • •

[R-319] MRS. ARNOLD: I believe that concludes the testimony, Your Honor.

THE COURT: All right, you can come down.

(Mr. Barber resumes seat at counsel table).

• • •

86-928

No.

IN THE

Supreme Court Of The United States

October Term, 1986

EDDIE BARNARD NEAL,
Petitioner,

vs.

J. D. WHITE, WARDEN, AND
CHARLES GRADDICK, ATTORNEY GENERAL
OF THE STATE OF ALABAMA,
Respondent

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Attorney for Petitioner Neal

November, 1986

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EDDIE B. NEAL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No.
	)	CV 85-A-2161-S
J. D. WHITE, Warden;	)	
ATTORNEY GENERAL OF	)	
THE STATE OF ALABAMA,	)	
	)	
Respondents.	)	

JUDGMENT

In conformity with the Memorandum Opinion filed contemporaneously herewith, it is ORDERED, ADJUDGED and DECREED that the petition for habeas corpus filed in this action be and the same hereby is DENIED.

DONE this 30th day of Sept., 1985.

/s/ C. W. ALLGOOD

Senior Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EDDIE B. NEAL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No.
	)	CV 85-A-2161-S
J. D. WHITE, Warden;	)	
ATTORNEY GENERAL OF	)	
THE STATE OF ALABAMA,	)	
	)	
Respondents.	)	

MEMORANDUM OPINION

In this petition for habeas corpus filed pursuant to 28 U.S.C. § 2254, petitioner attacks a sentence of life without parole imposed upon him in the Circuit Court of Jefferson County, Alabama after petitioner was convicted of robbery-murder.

As grounds for federal habeas relief, petitioner contends that he was deprived of a fair trial by the fact that prosecution peremptorily struck from the petit jury all potential jurors who were black. Secondly, petitioner contends that he was indicted under a law no longer in effect. Petitioner alleges that he was denied effective assistance of counsel; this allegation is based upon petitioner's contention that his counsel failed to object to the prosecution's use of peremptory challenges to strike all members of the members of the black race. Petitioner alleges that he was denied the right to cross-examination the witness whose prior testimony was read to the jury. Lastly, petitioner contends there was insufficient evidence to sustain a conviction. The criminal case involving this petitioner has a long, sad, and tragic history. Petitioner was first brought to trial in the Circuit Court of Jefferson County, Alabama in 1979 for the capital

offense of robbery during which the victim was intentionally killed. The trial jury recommended that the sentence of death be imposed upon this petitioner but the trial judge found that the mitigating factors outweighed the aggravating factors and commuted the sentence to life without parole. This conviction of petitioner was affirmed on direct appeal. *Neal v. State,* 372 So.2d 1331, *cert. denied,* 372 So.2d 1348 (1972). Subsequently, however, petitioner's conviction was reversed and remanded for a new trial on the authority of *Beck v. Alabama,* 447 U.S. 625 (1980).

Petitioner was retried and a verdict of guilty was rendered on September 13, 1982. Petitioner was again convicted of the capital offense; however, because of the prior sentence, the maximum sentence possible was life without parole. Petitioner was so sentenced. Petitioner's conviction after his retrial was affirmed by the Alabama Court of Criminal Appeals. *Neal v. State,* 460 So.2d 257, *cert. denied,* 460 So.2d 257 (1984).

Petitioner filed a petition for error coram nobis in the Circuit Court of Jefferson County, Alabama raising grounds almost identical to those asserted in this petition for habeas corpus. Relief was denied and the denial of relief was affirmed by the Alabama Court of Criminal Appeals without opinion on June 11, 1985.

The files and records of this case reflect that grounds one and two asserted by this petitioner were raised by him in his petition for writ of error coram nobis but were not raised on direct appeal. These issues were available and known to the petitioner at the time his direct appeal was perfected and his failure to assert these on direct appeal precludes reliance upon these issues in a collateral attack upon his judgment. This principle of waiver is well-established in the law of the State of Alabama and under the doctrine of *Wainwright v. Sykes,* 433 U.S. 72 (1977), a federal habeas corpus court is barred from review of these issues due to petitioner's procedural default since petitioner has satisfied neither the cause nor prejudice requirement. *See in this connection Ford v. Strickland,* 696 F.2d 804 (11th Cir. 1983).

Petitioner's attack on the performance of his attorney is equally without merit. In order for inadequate representation by counsel to be a valid basis for federal habeas relief, a petitioner must show that his counsel's performance was deficient and was so serious as to deprive the petitioner of a fair trial. In addition, petitioner is required to show that, but for the ineffective performance of his counsel, a different result would have been reached. *Strickland v. Washington,* ..... U.S. ....., 80 L.Ed.2d 674 (1984). Petitioner has utterly failed to allege any facts which would demonstrate ineffective assistance of counsel as that standard is described in *Strickland v. Washington supra.* In light of the facts of this case which are set out in detail in the opinion of the Alabama Court of Criminal Appeals in *Neal v. State,* 372 So.2d 1331, petitioner should heed the statement of the Alabama Court of Criminal Appeals as follows:

> "In the light of this entire record, we think this appellant was extremely fortunate to get life imprisonment without parole. He received a fair and impartial trial and he was capably represented by counsel appointed by the court. He owes his counsel an everlasting debt of gratitude. He should not be heard to complain further about his sentence."

Petitioner's contention regarding the inability to cross-examine a witness is based upon the trial court's receipt of the testimony of a witness who was hospitalized by utilizing a transcript of the direct cross-examination of this witness in the earlier trial. This procedure was clearly justified under state law and does not present a federal constitutional question.

Petitioner's suggestion that he was prosecuted under a statute not in existence is without merit. Petitioner was originally indicted under the provisions of Title 13-11-2, *Code of Alabama, 1975.* Upon revision of the Code, Title 13-11-2 became Title 13A-5-31. Title 13A-5-31 was repealed by Acts of 1981, No. 81-178, Section 20, effective July 1, 1981. The repeal of Title 13A-5-31 "shall not affect the application of preexisting law to conduct occurring before 12:01 a.m. on July 1, 1981." The incident which gave rise to the prosecution of this petitioner

occurred in 1976. Petitioner was tried under the appropriate statute of Alabama. *See* commissioner's notes following Title 13A-5-31 appearing on page 116 of the Alabama Code of 1975 (1982 replacement volume).

Petitioner's last attack is on the sufficiency of the evidence. The evidence received by the trial court and considered by the Alabama Court of Criminal Appeals was more than ample to satisfy the requirements of *Jackson v. Virginia,* 443 U.S. 307, 61 L.Ed.2d 560 (1979).

This petition for habeas corpus is therefore due to be denied. An appropriate judgment will be entered.

DATED this 30th day of Sept., 1985.

/s/ C. W. ALLGOOD

Senior Judge

86-928

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

EDDIE BERNARD NEAL,

PETITIONER

VS.

J. D. WHITE, Warden, and
THE ATTORNEY GENERAL OF
THE STATE OF ALABAMA,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

MARTHA GAIL INGRAM
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

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QUESTION PRESENTED FOR REVIEW

1. Should this Court grant certiorari to review a case when the case has been remanded to the district court for a review of the sufficiency of the evidence which, if found to be insufficient, would result in a new trial for Petitioner?

2. Is an issue involving the introduction at Petitioner's trial of the testimony of a witness who testified at the Petitioner's previous trial but was for health reasons unable to be at the subsequent trial worthy of certiorari review?

PARTIES

The caption contains the names of all the parties in the Court below.

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OCTOBER TERM, 1986

EDDIE BERNARD NEAL,

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RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS, STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals is an unpublished opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The petition addresses an issue involving the Sixth Amendment to the United States Constitution. Respondents' brief addresses 28 U.S.C. §1254.

REASONS FOR DENIAL OF THE WRIT

1. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW A CASE WHEN THE CASE HAS BEEN REMANDED TO THE DISTRICT COURT FOR A REVIEW OF THE SUFFICIENCY OF THE EVIDENCE.

On October 21, 1986, the United States Court of Appeals for the Eleventh Circuit issued as mandate their judgment in this case which affirmed in part and vacated in part the judgment of the district court below. The Eleventh Circuit remanded the issue of sufficiency of the evidence back to the district court with directions that the lower court assess the evidence introduced at trial to determine whether a rational trier of fact could have found the Petitioner guilty beyond a reasonable doubt. The lower court, on October 29, 1986, directed the Respondents to supplement their response to include the trial transcript and such was done by

Respondents on November 21, 1986. There has been no ruling by the district court on this issue at this time.

Because the district court has not yet made a determination as to the sufficiency of the evidence presented at Petitioner's trial, it would be premature for this Court to grant certiorari. The decision by the Eleventh Circuit is not a final judgment and 28 U.S.C. § 1257 precludes this Honorable Court from reviewing cases unless the petition is from a final judgment. Here, it is possible that the district court could hold that the State's evidence at Petitioner's trial was insufficient under the standard set forth in Jackson v. Virginia, 443 U.S. 307 (1979) and order the Petitioner be given a new trial or possibly released. Thus, it is conceivable that a review of this issue could moot this entire petition.

It has always been the policy of this Court that review of judgments and decrees of courts of appeals by certiorari was to be exercised sparingly, and only in cases of gravity and general importance. Except in extraordinary cases, the writ is not issued until a final decree. Hamilton-Brown Shoe Co., v. Wolf Bros. & Co., 240 U.S. 251 (1916). It has also been this Court's position to avoid "piecemeal" review of decisions and to avoid giving advisory opinions in cases where there may be no real case or controversy.

If this Court should decide to grant certiorari in this case, it will be providing piecemeal review of this case. It will review the Sixth Amendment issue raised in this petition and then, if the district court finds the evidence at trial was sufficient, will be asked to review that and other issues in a

subsequent petition. It is also possible that should this Court grant certiorari to review the issue raised in this petition, its ruling will be merely advisory in view of the possibility that the Petitioner could be ordered a new trial. The remandment of this case to the district court was not simply for the performance of a ministerial duty. The district court was ordered to make a full review of the evidence presented at trial and has in fact requested and received the entire trial transcript in light of Jackson v. Virginia, supra.

Therefore, Respondents submit that it would be premature and that this Court's scarce certiorari powers should not be squandered by reviewing the one issue raised in this petition.

II. THE ISSUE INVOLVING THE INTRODUCTION OF A TRANSCRIPT OF A WITNESS' TESTIMONY FROM THE PETITIONER'S PRIOR TRIAL AT HIS SUBSEQUENT TRIAL DUE TO ILLNESS OF THE WITNESS IS NOT WORTHY OF CERTIORARI REVIEW.

At Petitioner's prior trial, a police officer testified at the certain aspects of the investigation. At Petitioner's subsequent trial this witness was unavailable due to serious health problems. The trial court found that this witness was "unavailable" and the State was allowed to introduce into evidence a transcript of this witness' testimony from the prior trial. The district court, pursuant to Sumner v. Mata, 449 U.S. 539 (1981), was bound to accept the state court's findings as to this witness' disability and subsequent unavailability. Thus, this issue involved concerns a state evidentiary ruling and does not present a constitutional claim.

Moreover, it is clear that no constitutional violation occurred because of the unavailability of this witness and the introduction of his prior testimony. In Barker v. Page, 390 U.S. 719 (1960), it was held that there is an exception to an accused's constitutional right to be confronted with the witnesses against him where a witness is unavailable and has given testimony at a previous judicial proceeding against the same accused which was subject to cross-examination by that accused.

Also, in Mancusi v. Stubbs, 408 U.S. 204 (1972), it was held that the transcript of a witness' testimony at an accused's first trial bears sufficient indicia of reliability and affords the trier of fact at the accused's second trial a satisfactory basis for evaluating the truth of the prior statements so that if the witness is unavailable to testify

at the second trial the transcript of his testimony at the first trial may, consistently with the accused's constitutional right of confrontation, be admitted into evidence at the second trial, if certain requirements are met. These are: that at the first trial, which was for a serious felony and was conducted in a court of record before a jury, the accused was represented by counsel who was given an adequate opportunity to cross-examine the witness and who availed himself of that opportunity, and (2) that the accused's counsel at the second trial did not offer any new and significantly material line of cross-examination which was not at least touched upon at the first trial. Mancusi, supra.

Here, the trial record reveals that the witness' earlier testimony was basically unobjected to by Appellant.

The same counsel represented Appellant at both trials. The witness' testimony was subject to cross-examination by Appellant. The trial court stated that Witness Robbins' testimony was concerned with what he discovered at the scene of the crime and what he did with the evidence and these items had already been introduced into evidence and were "gone into at the prior trial".

The trial record further reflects that the basis for Appellant's objection to the introduction of this witness' prior testimony was that a new witness, co-defendant Jerry Lee Jones who did not testify in Appellant's first trial, was to testify in the second trial. Appellant stated that cross-examination of the unavailable witness was material to corroborate or disprove Jones' version of what occurred on the night of the murder.

This clearly was not a factor and in no way prejudiced Appellant as, while Jerry Lee Jones did take the witness stand, he did not give any testimony relative to the Appellant on the night of December 20, 1976. Therefore, the strategy of Appellant in regard to the cross-examination of the unavailable witness would not have been any different in the second trial than it was in the first trial. Therefore, Appellant's confrontation rights were not violated by the introduction of this transcript.

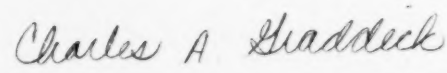
Furthermore, this witness would also be considered "unavailable" under the federal rules which state that a witness is unavailable if he is unable to be present ot to testify at the hearing because of death or some existing physical or mental illness or infirmity. Federal Rules of Evidence, § 804(a)(4).

The conclusion reached by the Alabama courts as well as the federal courts on this issue is correct. This Court's limited certiorari powers should not be used to review a state court's evidentiary ruling.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this the 10th day of December, 1986, I served three copies of the foregoing Brief and Argument in Opposition to Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals on the Attorney for the Petitioner by placing same in the United States Mail, first class postage prepaid and properly addressed as follows:

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